NO. 19861

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HUMBERTO COLLAZO,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

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I

JURISDICTION AND STATEMENT OF THE CASE

Appellant Humberto Collazo was indicted together with Jesus Marino Rodriguez by a Federal Grand Jury on June 17, 1964, for violation of Title 21, United States Code, Section 176(a), in a one-count indictment charging both defendants with receipt, concealment and facilitating the transportation of marihuana [C. T. 2]. 1/

Defendant Rodriguez pleaded guilty, and is not involved in this appeal [R. T. 69-74]. 2/

1/ Refers to Clerk's Transcript.

2/ Refers to Reporter's Transcript.

On September 18, 1964, after trial by jury, before the Honorable Peirson M. Hall, United States District Judge, a verdict of guilty was returned [C. T. 32].

On October 12, 1964, appellant was sentenced to incarceration for a period of ten years [C. T. 34].

On October 22, 1964, appellant filed a timely notice of appeal.

Jurisdiction of the District Court rested on Title 21, United States Code, Section 176(a), and Title 18, United States Code, Section 3231. This Honorable Court has jurisdiction under Title 28, United States Code, Section 1291 and 1294.

II

STATUTE INVOLVED

Title 21, United States Code, Section 176(a), provides in pertinent part as follows:

> "Notwithstanding any other provision of law, whoever, knowingly, with intent to defraud the United States, imports or brings into the United States marihuana contrary to law, or smuggles or clandestinely introduces into the United States marihuana which should have been invoiced, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such marihuana after being imported or brought in, knowing

the same to have been imported or brought into the United States contrary to law, or whoever conspires to do any of the foregoing acts, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under Section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned for not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

"Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had the marihuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury."

III

STATEMENT OF FACTS

On May 26, 1964, appellant bought two first-class tickets on a United Air Lines flight departing Los Angeles at 10:45 P. M., for New York. Joan E. Perkins, ticket agent for United Air Lines specifically recalled the sale of these two tickets (Exhibits No. 4, 5), to the appellant [R. T. 113-118]. Thereafter, on the same day, Thomas Wallin, United Air Lines agent at the los Angeles

International Airport checked Exhibit No. 1 (a green valise), which by stipulation contained marihuana [R. T. 109-113], through to New York for non-appealing co-defendant Rodriguez, and affixed the baggage stub to Exhibit No. 4 (one of the two tickets bought by appellant).

On the same day, United Air Lines agent Wallin checked Exhibits Nos. 2 and 3 (two valises containing marihuana, [R. T. 109-113]), through to New York for appellant [R. T. 121-124]. The baggage checks were affixed to Exhibit No. 5 (one of the tickets purchased by appellant), and the baggage placed on the plane departing for New York.

Lt. Butler of the Los Angeles Police Department then testified as to the search and seizure of Exhibit No. 1, which is not a point in issue in the instant appeal. Sgt. Beckman of the Los Angeles Police Department then testified that he attended the search and seizure of Exhibit No. 1. A full hearing was held by the District Court following a timely motion by counsel for co-defendant Rodriguez, relative to the validity of the search and seizure of Exhibit No. 1, and the motion to suppress was denied. This motion was not joined in by the appellant Collazo [R. T. 25-68].

After the arrest of Rodriguez, Sgt. Beckman called Officer Michael Tobin of the New York Police Department [R. T. 150-151]. Officer Tobin testified that after observing the arrival of the flight upon which Exhibits 2 and 3 were placed, and seeing no one answering the description of appellant, he approached the luggage from the flight, which was subject to immediate claim, in the baggage

room of the United Terminal at Kennedy Airport in New York. He smelled the valises which had not yet been claimed (without touching them), detected the odor of marihuana, and noted the type of combination locks on 2 pieces of luggage, which in his experience was of a type used by persons who transported marihuana. He thereupon opened Exhibits Nos. 2 and 3 and found the marihuana [R. T. 153-157]. The shoes later referred to in this matter were found together with other items of clothing in Exhibits Nos. 2 and 3 [R. T. 157-159]. At that point in the trial the two baggage checks, that had been identified by witness Tobin as having been on Exhibits Nos. 2 and 3 were received in evidence as 2A and 3A [R. T. 164-166]. The numbers on the baggage checks affixed to Exhibits Nos. 2 and 3 and the baggage stubs affixed to Exhibit No. 5 (one of the two tickets bought by appellant), are the same [R. T. 122-124; 164-166].

Mr. Tobin testified that through investigation he ascertained that the shoes found in the luggage had been purchased by appellant.

The shoe salesman, Joseph Leder, verified the connection of appellant to the shoes that had been identified by witness Tobin, by testifying that he specifically recalled the purchase of two pairs of shoes by appellant, including the pair found in the luggage [R. T. 168-172].

During the testimony of appellant in his own behalf, the District Court, at the request of the prosecution, directed the appellant to remove the shoes he was wearing so Mr. Joseph Leder could examine them for the purpose of determining whether or not

the pair of shoes worn by appellant was the other of the two pairs bought by appellant [R. T. 220-221]. On rebuttal, Mr. Leder testified that the pair of shoes worn by the appellant was in fact the other pair bought by the appellant [R. T. 231-232].

ARGUMENT

I

APPELLANT'S CONSTITUTIONAL RIGHTS UNDER THE FOURTH AMENDMENT WERE NOT VIOLATED.

A. Failure to Object in the Trial Court Acts As a Waiver of This Objection.

Appellant on page 21 of his brief refers to a motion to suppress the evidence at issue herein, namely, Exhibits 2 and 3, the suitcases containing marihuana seized in New York. A careful examination of the record reveals no such motion to suppress Exhibits 2 and 3. In fact, the only objections raised to the introduction of this evidence were as to foundation and connection with appellant. Ergo, the appellant, must be considered to waive his motion to suppress. Absent such motion, the receipt into evidence of the questioned exhibits does not constitute "plain error" under Rule 52(b), Federal Rule of Criminal Procedure, but rather is within the discretion of the trial court, as is shown under "B" below.

Jones v. United States, 204 F. 2d 745 (7 Cir. 1953),

cert. den. 364 U. S. 854;

Taylor v. Hudspeth, 113 F. 2d 835 (10 Cir. 1940).

B. The Search and Seizure Herein Was Proper.

The facts adduced at trial, consisting of the arrest and seizure relating to non-appealing co-defendant Rodriguez [R. T. 25-68]; the identity of the single purchaser of the two tickets as the appellant [R. T. 115-116, 148]; the strong possibility that the baggage would have been claimed if a delay was encountered [R. T. 153-157]; the identity of the baggage stubs relating to the questioned exhibits [R. T. 130]; the type of combination locks on the luggage; the smell test used by the officer [R. T. 153-157], considered together, establish as reasonable, the action of the officer.

United States v. Dornolut, 261 F. 2d 949 (2 Cir. 1959), cert. den. 360 U. S. 912.

Simply stated, the question here is merely whether or not the arresting officers acted reasonably at the time the seizure was made.

It is accepted that only unreasonable searches and seizures are illegal. That illegality, for the most part, rests on a lack of probable cause or other validating circumstances. The testimony adduced at trial, as more specifically set forth above, showing: the appellant to have purchased the two tickets; the identity of the baggage check stubs on the tickets with the baggage check stubs on the valises containing the marihuana; the type of combination locks

used and the smell test used by the officer, clearly show probable cause.

As further basis for the search that transpired, the actual time-wise situation that existed at the Kennedy International Airport, testified to by Officer Tobin, revealed that at any time the bags could have been claimed by the holder of the baggage checks, or someone acting in his behalf, thereby necessitating immediate action by the officer when faced with this situation.

Henry v. United States, 361 U.S. 98 (1960);

Brinegar v. United States, 338 U.S. 160 (1949);

United States v. McDaniel, 154 F. Supp. 1, aff'd. 255 F.2d 896, cert. den. 350 U.S. 853;

Davis v. United States, 327 F.2d 301 (9 Cir. 1964);

Cervantes v. United States, 278 F.2d 350 (9 Cir. 1960).

In fact, in the case of Hernandez v. United States, 353 F.2d 624 (9 Cir. 1966), a case that is practically on all fours with the facts herein, this court stated at page 627 and 628:

> "The question remains whether the search of appellant's bags violated the 4th amendment. Sgt. Butler had no warrant. Hence the search was invalid unless made (1) incidental to a lawful arrest, or (2) in 'exceptional circumstances -- in this case, that contraband was threatened with imminent removal or destruction. (citations) We hold that the search

was not incident to appellant's subsequent arrest . . . but rather, because the search was in fact independent of the arrest. . . . These elements, taken together with the use of Ventura combination-lock suitcases, payment in bills of large demonination and the apparent Latin-American derivation of the passenger . . . illuminated by Sgt. Butler's past experience they furnished reasonable grounds for him to believe . . . that appellant's suitcases contained marijuana,' and finally the court points out (as in the present case), 'The circumstances upon which Sgt. Butler relied were within his knowledge before the search was initiated, and were sufficient to justify a reasonable man in believing that the very bags which Sgt. Butler searched did in fact contain marijuana.' " (Emphasis added).

II

POSSESSION OF MARIHUANA WAS CLEARLY ESTABLISHED.

The facts as spelled out herein showing possession, ownership and control of the marihuana by appellant clearly satisfy the provisions of Title 21, United States Code, Section 174, as needed to invoke the presumption of guilty knowledge [R. T. 141-143, 154, 157-158, 160, 164, 170-172].

Clearly the possession spelled out by the testimony comes within the rule set forth in Hernandez v. United States, 300 F. 2d 114 (9 Cir. 1962), where this court stated at page 117:

> "We have not hesitated to uphold convictions under Section 174 wherever either actual or constructive possession could be honestly, fairly and conscientiously inferred."

Rodella v. United States, 286 F. 2d 306
(9 Cir. 1960);

Modrano v. United States, 315 F. 2d 361
(9 Cir. 1963);

Brothers v. United States, 328 F. 2d 151
(9 Cir. 1964).

III

THE DISTRICT COURT DID NOT ERR IN REQUIRING REMOVAL AND EXAMINATION OF APPELLANT'S SHOES.

A. It is well established that when a defendant takes the stand in his own defense he waives his right of privilege against self-incrimination. This applies particularly where the testimony sought relates to appellant's direct testimony, which was the case here [R. T. 208, 215-216].

Ruffel v. United States, 271 U. S. 494 (1926);

United States v. Provoo, 215 F. 2d 531 (2 Cir. 1954), aff'd. 350 U. S. 857 (1955).

B. In any event inspection of defendant's body, or his apparel, as physical evidence, is never privileged.

Holt v. United States, 218 U. S. 245 (1910);

164 A. L. R. 952;

Smith v. United States, 187 F. 2d 192 (D. C. Cir. 1950);

See also:

People v. Haeussler, 41 Cal. 2d 252 (1953);

People v. Clark, 18 Cal. 2d 449 (1941).

CONCLUSION

For the reasons above submitted, it is respectfully requested that the appeal be denied and the judgment below affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Jules D. Barnett

JULES D. BARNETT